

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BESARO MOBILE HOME PARK, LLC,

Plaintiff,

v.

CITY OF FREMONT,

Defendant.

No. C 05-2886 CW

ORDER GRANTING
DEFENDANT'S
MOTION TO DISMISS
THE SECOND
AMENDED COMPLAINT

Defendant City of Fremont (Fremont) moves pursuant to Rules 12(b)(1) and 12(b)(6) to dismiss the second amended complaint (SAC) of Besaro Mobile Home Park (Besaro). Besaro opposes the motion. The matter is decided on the papers and the hearing set for October 27, 2006 is VACATED. Having considered all of the papers filed by the parties, the Court GRANTS with prejudice Fremont's motion to dismiss.

BACKGROUND

As discussed in the order dismissing the first amended complaint (FAC), Plaintiff Besaro is the owner of a mobile home park in Fremont.¹ Besaro's tenants own their mobile homes but rent the underlying mobile home spaces. This controversy arises out of

¹For a complete overview of the factual basis for this case, see the Court's July 10, 2006 Order.

1 Ordinance No. 2390, which amended Fremont's rent control law. On
2 December 16, 2005, Plaintiff filed its FAC, alleging claims against
3 Fremont for: (1) taking property "without payment of just
4 compensation and/or due process of law" in violation of the Fifth
5 and Fourteenth Amendments of the United States Constitution and 42
6 U.S.C. § 1983; (2) taking property in violation of the California
7 Constitution; and (3) declaratory relief.

8 The Court dismissed the FAC, finding (1) that an as-applied
9 challenge under the Takings Clause was not ripe due to failure to
10 exhaust State remedies; (2) that the federal substantive due
11 process claim was not properly plead because it alleges a claim
12 that can be analyzed under the Takings Clause; (3) that any facial
13 challenge stated a cause of action that accrued when the vacancy
14 control ordinance was originally passed in 1992 and thus was barred
15 by the statute of limitations; and (4) that Besaro's allegations of
16 the lack of a valid purpose to support its Takings Clause claims
17 were conclusory and failed to state a claim.

18 The Court granted Besaro leave to amend its complaint,
19 instructing (1) that it may file an as-applied challenge to the
20 ordinance once it is exhausted; (2) that it may replead a
21 substantive due process claim if it can allege a claim that cannot
22 be analyzed under the Takings Clause or another explicit
23 constitutional provision; (3) that it may replead its facial
24 challenge if it can allege a Takings Clause claim that accrued as a
25 result of the 2000 enactment of Ordinance No. 2390; and (4) that it
26 may replead the lack of public purpose claim if it could make non-
27 conclusory allegations to support its claim.

1 Besaro filed its SAC on July 19, 2006, alleging the same three
2 claims. However, Besaro amended its § 1983 claim to clarify that
3 it did not "allege a taking under the just compensation clause of
4 the Fifth Amendment." SAC ¶ 41. Rather, Besaro claims that
5 Ordinance No. 2390 (1) constitutes a "taking of [its] property
6 without a valid public purpose and/or without due process of law;"
7 (2) constitutes a taking in violation of the California
8 Constitution; and (3) is "invalid and unenforceable, both on its
9 face and as applied [because it] violate[s] rights guaranteed to
10 Plaintiff under the federal and/or state constitutions . . .
11 including the right to rents that reflect 'general market
12 conditions.'" SAC ¶¶ 41, 60.

13 Fremont again moves to dismiss the complaint pursuant to Rule
14 12(b)(1), arguing that if Besaro is alleging a facial challenge it
15 is time-barred and if it is alleging an as-applied challenge it is
16 unripe, and Rule 12(b)(6), arguing that any claim, even if properly
17 before the Court, fails to state claim.

18 LEGAL STANDARD

19 As stated in the Court's order granting the original motion to
20 dismiss, dismissal is appropriate under Rule 12(b)(1) when the
21 district court lacks subject matter jurisdiction over the claim.
22 Fed. R. Civ. P. 12(b)(1). Federal subject matter jurisdiction must
23 exist at the time the action is commenced. Morongo Band of Mission
24 Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380 (9th
25 Cir. 1988), cert. denied, 488 U.S. 1006 (1989). A Rule 12(b)(1)
26 motion may either attack the sufficiency of the pleadings to
27 establish federal jurisdiction, or allege an actual lack of
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1 jurisdiction which exists despite the formal sufficiency of the
2 complaint. Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594
3 F.2d 730, 733 (9th Cir. 1979); Roberts v. Corrothers, 812 F.2d
4 1173, 1177 (9th Cir. 1987).

5 Under Rule 12(b)(6), a motion to dismiss for failure to state
6 a claim will be denied unless it is "clear that no relief could be
7 granted under any set of facts that could be proved consistent with
8 the allegations." Falkowski v. Imation Corp., 309 F.3d 1123, 1132
9 (9th Cir. 2002), citing Swierkiewicz v. Sorema N.A., 534 U.S. 506
10 (2002). All material allegations in the complaint will be taken as
11 true and construed in the light most favorable to the plaintiff.
12 NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

13 Although the court is generally confined to consideration of the
14 allegations in the pleadings, when the complaint is accompanied by
15 attached documents, such documents are deemed part of the complaint
16 and may be considered in evaluating the merits of a Rule 12(b)(6)
17 motion. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th
18 Cir. 1987).

19 DISCUSSION

20 I. Due Process Claim

21 In addition to claims under the Takings Clause, Besaro
22 continues to allege claims based on substantive due process.
23 However, the Court in dismissing the FAC granted leave to amend the
24 substantive due process claim only if Besaro could allege a claim
25 that cannot be analyzed under the Takings Clause or another
26 explicit constitutional provision. July 10, 2006 Order at 9. As
27 the Court noted in its earlier order, it is clear that

1 "[s]ubstantive due process analysis has no place in contexts
2 already addressed by explicit textual provisions of constitutional
3 protection." Armendariz v. Penman, 75 F.3d 1311, 1325-26 (9th Cir.
4 1996).

5 Besaro alleges that Fremont's actions are impermissible
6 because they are not based on a valid public purpose and therefore
7 cannot be analyzed under the Takings Clause or remedied by "just
8 compensation." Opposition at 12. However, as Fremont notes, a
9 Takings Clause analysis does consider whether a taking is for a
10 valid public purpose, because it only allows just compensation as a
11 remedy for "public use." Besaro bases its due process and Takings
12 Clause claims on identical facts, further emphasizing the fact that
13 the conduct Besaro challenges is covered by the Takings Clause.
14 See SAC ¶¶ 40-54. Although Besaro argues in its opposition that it
15 has a separate right "under the due process clause to raise the
16 rent at each space to reflect 'general market conditions,'" this
17 claim is identical to its claim under the Takings Clause. The
18 Court finds that Besaro has failed to allege a claim that cannot be
19 analyzed under the Takings Clause. Therefore, Besaro's claims
20 under the Fourteenth Amendment are dismissed. Because Besaro has
21 had an opportunity to replead these claims, but has not followed
22 the Court's instruction, the claims are dismissed with prejudice.

23 II. Ripeness

24 Fremont again moves to dismiss the complaint under Rule
25 12(b)(1) on the ground that the Court lacks jurisdiction because
26 the SAC makes a federal claim for unlawful taking without
27 compensation, and this is not ripe because Besaro has not yet
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1 sought a remedy in State court. Besaro counters that it does not
2 intend to make a claim for just compensation; rather, it argues,
3 the ordinance is facially unconstitutional because it lacks a valid
4 public purpose and is unconstitutional as applied because it
5 prevents Besaro from charging "rents that reflect 'general market
6 conditions.'" Opposition at 3. Therefore, Besaro cites Lingle v.
7 Chevron, 544 U.S. 528 (2005), for the proposition that this is an
8 "impermissible taking" and that no amount of compensation could
9 remedy the effect of Fremont's regulation. Opposition at 2.

10 The Court has acknowledged that facial challenges are not
11 subject to the ripeness requirement. See July 10, 2006 Order at 7.
12 While Besaro continues to state in its SAC that the ordinance is
13 unconstitutional as applied, see SAC at ¶¶ 42, 61, its opposition
14 appears to defend only its facial claims with respect to ripeness.
15 See Opposition at 15 ("Because the City's new ordinance can be
16 challenged on its face, the City's 'ripeness' argument must
17 fail."). As in its order on the motion to dismiss the FAC, the
18 Court assumes that Besaro intended to bring only a facial challenge
19 to the ordinance. Therefore the Court finds that to the extent
20 that Besaro's claims are facial challenges to the ordinance, they
21 are ripe, although, as discussed below, they are barred by the
22 statute of limitations.

23 III. Statute of Limitations

24 Fremont also moves again to dismiss the complaint on the
25 grounds that the first claim is barred by the applicable statute of
26 limitations.

27 As the Court noted in its order dismissing the FAC, when a
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1 plaintiff brings a facial challenge under the Takings Clause, "the
2 cause of action accrues and the limitations period begins to run
3 upon the enactment of the statute." Levald, Inc., v. City of Palm
4 Desert, 998 F.2d 680, 687 (9th Cir. 1993). Therefore, the Court
5 found that the cause of action accrued when a vacancy control
6 ordinance was passed in 1992, not, as Besaro argued, when Ordinance
7 No. 2390 was passed in 2000. The Court found that the statute of
8 limitations barred the action, but granted Besaro "leave to file a
9 SAC if it can allege, truthfully and without contradicting the
10 original complaint, a facial challenge under the Takings Clause
11 that accrued as a result of the 2000 enactment of Ordinance No.
12 2390." July 10, 2006 Order at 11.

13 Besaro again argues that changed economic circumstances
14 justify the delay in bringing the action, citing the fact that "the
15 circumstances that may have justified the imposition of 'full
16 vacancy control' in 1992 no longer existed in the year 2000."
17 Opposition at 19. However, the Court has already rejected this
18 argument, finding that it transforms the claim into an as-applied
19 challenge that must be dismissed as unripe. See July 10, 2006
20 Order at 10. Besaro attempts to argue that this claim is not
21 subject to the ripeness requirement because it is based on its
22 assertion that the ordinance lacks a public purpose. However, this
23 circular argument again states Besaro's claim as a facial challenge
24 that is barred by the statute of limitations.

25 IV. Valid Public Purpose

26 As it found in its order dismissing the FAC, the Court again
27 finds that even if Besaro's claim were not time-barred, it would be
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1 dismissed for failure to state a claim.

2 Besaro's only claim not already rejected by the Court is that
3 it has a constitutional right to raise rents to reflect "general
4 market conditions." However, there is nothing to support the
5 existence of such a constitutional right. The State cases that
6 Besaro cites in support of this proposition hold only that a rent
7 control ordinance must contain an adjustment mechanism "to provide
8 for changes in circumstances and also provide for the previously
9 mentioned situations in which the base rent cannot reasonably be
10 deemed to reflect general market conditions." Birkenfield v. City
11 of Berkeley, 17 Cal. 3d 129, 169 (1976). Further, as Fremont
12 notes, such a right would make any rent control ordinance
13 unconstitutional "because they are designed to reduce rents below
14 market when the market allows excessive rents." Reply at 4.

15 The Court finds that Besaro has failed to include in its SAC
16 "additional, non-conclusory allegations to support its claim that
17 Fremont lacked any public purpose when it enacted Ordinance No.
18 2390" as instructed in the order dismissing the FAC. July 10, 2006
19 Order at 14. Therefore, the SAC is dismissed with prejudice.

20 CONCLUSION

21 For the foregoing reasons, Fremont's motion to dismiss is
22 GRANTED (Docket No. 33). The complaint is dismissed with prejudice
23 to refiling a facial challenge to the ordinance and without
24 prejudice to refiling an as-applied challenge upon exhaustion of
25 State remedies. The Court also GRANTS Fremont's request for
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1 judicial notice. Judgment shall enter accordingly. Plaintiff
2 shall bear Defendant's costs of the action.

3 IT IS SO ORDERED.

4
5 10/19/06

6 Dated: _____

Claudia Wilken

CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE